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Exercising the Right to Self-Representation in United States v. Farhad: Issues in Waiving a Criminal Defendant's Sixth Amendment Right to Counsel

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NOTE

EXERCISING THE RIGHT TO SELF-REPRESENTATION IN *UNITED STATES v. FARHAD*: ISSUES IN WAIVING A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL

Even the intelligent and educated layman has small and sometimes no skill in the science of the law...He lacks both the skill and knowledge adequately to prepare for his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[1]

I. INTRODUCTION

Ever since the United States Supreme Court's recognition of the right to waive counsel in *Faretta v. California*,[2] the corollary right to self-representation has been a constant compo-

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[1] *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (Opening quote written by Justice Sutherland).

[2] 422 U.S. 806 (1975). The Supreme Court held that a criminal defendant has an absolute right to waive counsel, recognizing the right to self-representation. *See id.*

nent of the American criminal justice system.[3] In *Farhad v. United States*,[4] the Ninth Circuit held that a defendant's repeated statement of an unequivocal desire for self-representation constitutes a valid waiver of his Sixth Amendment right to counsel.[5] Citing *Faretta*, the Ninth Circuit held that the defendant made a knowing, intelligent, and unequivocal waiver of his right to self-representation.[6] However, the Ninth Circuit ignored the more fundamental issue of whether upholding defendant's right to self-representation resulted in the denial of his right to a fair trial.

Though all U.S. courts recognize the right to self-representation as a result of the Supreme Court's decision in *Faretta*, constitutional and procedural issues affect its effective implementation. This note explores the Sixth Amendment's right to waive counsel and its effect on a criminal defendant's Fifth Amendment right to receive a fair trial. The Ninth Circuit's decision in *Farhad* is critiqued on two issues: first, the failure to address standby counsel in sharing duties of representation with the defendant;[7] and second, the court's failure to address Farhad's lack of access to the means of developing his case.[8] Lastly, this note proposes the appointment of mandatory standby counsel for pro se defendants as a means of protecting the defendant's constitutionally guaranteed right to a fair trial while respecting the defendant's autonomy in the criminal justice system.

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[3] *See infra* notes 51-157 and accompanying text.

[4] 190 F.3d 1097 (9th Cir. 1999).

[5] *See id.* at 1100.

[6] *See id.*

[7] *See id.* at 1099. In *Farhad*, the lower court refused defendant's request to share duties with standby counsel. Rather, they provided him with the assistance of standby counsel limited generally to providing guidance and answering defendant's questions throughout the trial. *See id.*

[8] *See id.* at 1099. The lower court also denied Farhad's repeated requests for access to a legal library, investigator and witnesses. *See id.*

II. FACTS AND PROCEDURAL HISTORY

While serving an unrelated sentence at San Quentin State Penitentiary, Kashani Farhad filed 29 fraudulent tax returns claiming refunds from 16 states.[9] Farhad collected approximately $20,000 using fictitious employers and social security numbers.[10] Prison officials became suspicious of the volume of mail from state tax bureaus and ultimately uncovered Farhad's scheme.[11] Farhad was indicted on fourteen counts of mail fraud in violation of 18 U.S.C. § 1341,[12] and five counts for the fraudulent use of social security numbers in violation of 42 U.S.C. § 408(a)(7)(B).[13]

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[9] *See Farhad*, 190 F.3d at 1098. Defendant developed a simple scheme of filing fraudulent tax returns using his own name, prisoner ID number, and prison address. *See id.*

[10] *See id.* at 1098.

[11] *See id.*

[12] *See* 18 U.S.C.A. § 1341 (1999). "Frauds and swindles" provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized mail depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives there from, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. *Id.*

[13] *See* 42 U.S.C.S. § 408 (1999). "Penalties" provides, in pertinent part:

> (a) In General. Whoever – (7) for the purpose of causing an increase in any payment authorized under this title [42 USCS §§ 401 et seq.] (or any other program financed in whole or in part from Federal funds), or for the purpose of causing a payment under this title [42 USCS §§ 401 et seq.] (or any such other program (to be made when no payment is authorized thereunder, or for the purpose of obtaining (for himself or any other person) any payment or any benefit to which he (or such other person), is not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose – (B) with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to

The district court appointed a federal public defender to represent Farhad.[14] However, Farhad informed the court that he intended to proceed pro se.[15] The district court held a hearing to determine Farhad's competence to represent himself and questioned Farhad under oath regarding his decision to go forward pro se.[16] The district court informed Farhad of the charges against him and the potential consequences if convicted.[17] Farhad replied that he understood the court's concern but reiterated his decision to proceed without counsel.[18] The district court warned Farhad that he was "making things harder" for himself by electing to proceed pro se.[19] The district court also informed Farhad that he would not have the assistance of standby counsel,[20] the use of an investigator, or access to a law library.[21] Despite these warnings from the court,

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another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person. *Id.*

[14] *See* Powell v. Alabama, 287 U.S. 45 (1932). Under the Sixth Amendment right to the assistance of counsel, a criminal defendant is always required to have counsel. If the defendant is indigent, the state is required to provide a public defender. *See id.*

[15] *See Farhad,* 190 F.3d at 1098. "Pro se" is Latin for "for himself." In a legal context, pro se representation is one in which an individual represents himself without the aid of counsel. *See* BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

[16] *Farhad,* 190 F.3d at 1098. Responding to the court's questions regarding Farhad's understanding of the proceedings and why he wanted to represent himself, Farhad stated he believed he could put forth a "more effective defense" than a public defender. *Id.*

[17] *See id.* The court warned Farhad that each of the nineteen counts had a "maximum penalty of five years in prison," which could run consecutively and "result in a very long time." The court also explained that each count exposed him to a $250,000 fine, three years supervised release, a $50 special assessment fee; and a restitution order. *Rep. Tr.* at 8-9.

[18] *See Farhad,* 190 F.3d at 1099.

[19] *Id.* at 1098. The court informed Farhad that he would be responsible for arguing motions, making objections, and abiding by the rules of evidence and procedure. The court stated Farhad would "not get any breaks from the Court," again informing him that he had the right to attorney representation. *See id.*

[20] *See id.* at 1099. The term "standby counsel" refers to a public defender appointed to a pro se defendant acting in an advisory role. There are varying levels of assistance standby counsel may provide. *See* John H. Pearson, *Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial,* 72 CALIF. L. REV. 697, 713 (1984).

Farhad indicated that he still wished to proceed pro se, insisting on his "absolute right" to act as his own attorney.[22]

Despite the court's warning that he was not entitled to standby counsel, the district court appointed an assistant public defender to assist Farhad.[23] Farhad informed the court that he wanted to make his own opening and closing statements as well as exercise challenges during jury selection.[24] Farhad requested that standby counsel perform all other duties.[25] The district court rejected Farhad's proposition, stating that "it cannot be done that way. You do it all or he does it all."[26] Farhad withdrew his request for "hybrid representation"[27] and the district court held that Farhad had knowingly and voluntarily waived his right to counsel and permitted him to proceed pro se.[28] Nevertheless, during pre-trial preparations, the district court asked Farhad on several occasions whether he

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[21] *Farhad*, 190 F.3d at 1099. The court also informed Farhad that if he proceeded pro se, he would lose a right to appeal based on a claim of ineffective assistance of counsel or because he "got a bad trial." *Id.*

[22] *Id.*

[23] *See id.*

[24] *See id.*

[25] *See Farhad*, 190 F.3d at 1099. Farhad sought to have standby counsel to cross-examine witnesses, make objections, and make motions to the court. *See id.*

[26] *Id.* The court, in its discretion, may deny "hybrid counsel" pursuant to the Supreme Court's ruling in *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (holding that a trial judge is not required to permit "hybrid" representation).

[27] *See Farhad*, 190 F.3d at 1099. Hybrid representation or co-counsel has been defined as the "most extreme form of advisory counsel" where both defendant and counsel participate in jury selection, statements, and questioning. *See* Pearson, *supra* note 20, at 713.

[28] *Farhad*, 190 F.3d at 1099.

wanted counsel.[29] In response to the court's inquiries, Farhad reaffirmed his commitment to represent himself.[30]

Farhad performed miserably at trial.[31] With no understanding of the rules of evidence, Farhad repeatedly thwarted his case by providing admissions and failing to protect his interests.[32] Farhad's inability to properly represent himself was further apparent during cross examination.[33] While cross-examining a government witness, Farhad argued with the witness about his testimony.[34] Further, Farhad failed to object to damaging testimony.[35] Accordingly, the court attempted to

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[29] *See id.* On one occasion, when the court refused Farhad's request for an investigator to help him locate witnesses, the court said, "You've chosen to represent yourself. Now if [the public defender] were representing you in this case, then he has a number of resources available to him...That's why you're really hurting your chances in this case by doing this. You can reconsider, by the way, if you want to change your mind, and get [the public defender] to represent you." *Id.*

[30] *See id.*

[31] *See id.* at 1102.

[32] *See Farhad,* 190 F.3d at 1102. Prior to Farhad deciding to proceed pro se, the federal public defender had obtained an order restricting the introduction of evidence of Farhad's prior conviction and current incarceration. During opening statements, Farhad informed the jury, "I am a prisoner myself, you know?" He also stated, "I might have done these things, but you know, it's not very certain, you know, that for sure I have done this...I'm not saying that no checks have been coming to my house. It might have been." Farhad also admitted, "[I] had some tax forms in my cell." He concluded his opening statement by informing the jury that "it doesn't matter what you think, you know?" *Id.* at 1102-1103.

[33] *See id.* at 1103.

[34] *See id.*

[35] *See Farhad,* 190 F.3d at 1103. One damaging colloquy involved the cross-examination of the correctional officer who searched his cell and discovered the tax forms:

Q: Is that possible, that the boxes, you know, that has my name – it was written by another
inmate?
A: No, it was not.
Q: How can that be?
A: Because your cell mate's box was on one end of the bed, and you made sure your box was on
the other end. You did not have anything but a box of tax forms. And Kashani, if you want
to get into it, you're a loner, you have all your stuff to yourself. Nobody even knew much

persuade Farhad to allow standby counsel to take his direct testimony but Farhad again refused and insisted on proceeding alone.[36] Farhad's effort to take direct testimony consisted of asking and answering questions to himself.[37] Additionally, Farhad asked himself argumentative and leading questions which misstated the law.[38] Farhad faced similar problems when providing evidence to the jury.[39] For example, when Farhad submitted a handwriting exemplar to the jury, the court had to instruct the jury to disregard it because it stated: "Farhad is an innocent man."[40]

Furthermore, Farhad failed to understand the proceedings.[41] He confused the roles played by various people in the courtroom.[42] For example, Farhad repeatedly referred to the prosecution witness as the defendant.[43] Additionally, Farhad did not know the meaning of the word "stipulation" or understand its significance when informed of the implication of entering into a stipulation regarding his fingerprints and handwriting.[44] At the close of the prosecution's case, Farhad

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about you. You don't even talk to people at the prison.

Farhad neither objected to this testimony nor asked that it be stricken. He never objected that the government's failure to lay any foundation for the testimony that the bunk searched was Farhad's, but instead admitted that the tax forms were his, and that he was reading them "like a magazine or book." *Id.*

[36] *See id.*

[37] *See id.* In the course of his testimony, Farhad referred to himself interchangeably as "you," "me," "Mr. Farhad," "Farhad Kashani," and "Kashani Farhad." *Id.*

[38] *See Farhad,* 190 F.3d at 1102-1103. One of his first questions was: "Mr. Farhad, did San Quentin authority throw you in the hole based on a phone call that a department of revenue made to them?" The district court sustained an objection to this question, as well as to 19 of Farhad's 51 other questions. *Id.*

[39] *See id.*

[40] *Id.* at 1104.

[41] *See id.* at 1103.

[42] *See Farhad,* 190 F.3d at 1104.

[43] *See id.*

[44] *See id.* A stipulation is an agreement, admission, or concession made by parties in a judicial proceeding. *See* BLACK'S LAW DICTIONARY 1451 (6th ed. 1990). When the stipulated evidence was presented during trial, Farhad asked the court to "take that stipulation away." *See Farhad,* 190 F.3d at 1104.

asked the court to have standby counsel sit away from him because he believed that the lawyer was laughing and making faces at him.[45]

Farhad's closing argument consisted of declarations that he should be found "100 percent not guilty" because "there was no videotape. There was no camera. There was no pictures...There was no DNA."[46] Farhad also asked the jury to return a "true verdict, a just verdict, that the prosecution has proved its allegation."[47] The jury found Farhad guilty on all 19 counts.[48] The court sentenced Farhad to 27 months in prison and ordered him to pay $19,095.70 in restitution.[49] Farhad filed four pro se notices of appeal to the Ninth Circuit Court of Appeals.[50]

III. BACKGROUND

A. ESTABLISHING A PROCEDURAL MINIMUM STANDARD TO WAIVE COUNSEL

In 1976, the United States Supreme Court recognized the right to self-representation in *Faretta v. California*,[51] finding implicit in the Sixth Amendment a right to self-representation in criminal cases.[52] The defendant, Anthony Faretta, was

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[45] *See Farhad,* 190 F.3d at 1104. The judge ordered Farhad's stand by counsel to sit in the back of the courtroom, ending contact between standby counsel and defendant. *See id.*

[46] *Id.*

[47] *Id.* at 1097. Farhad was convicted on 14 counts of mail fraud and 5 counts of the false use of social security numbers. *See id.*

[48] *See Farhad,* 190 F.3d at 1105.

[49] *See id.* at 1098.

[50] *See id.* at 1105. Farhad claimed on four separate appeals that he had not knowingly, intelligently, and unequivocally waived his right to counsel. Additionally, he argued that the right to self-representation should be reconsidered. *See id.*

[51] 422 U.S. 806 (1975).

[52] *See Faretta*, 422 U.S. at 818. The Court in *Faretta* reasoned that because the Sixth Amendment discusses counsel for criminal defendants as "assistance of counsel,"

charged with grand theft and requested permission from the Superior Court of Los Angeles County to proceed pro se.[53] The superior court questioned Faretta to determine his understanding of the proceedings.[54] Based on Faretta's responses, the court issued a preliminary ruling accepting Faretta's waiver of the assistance of counsel.[55] Soon after granting Faretta's request to represent himself, the superior court, on its own initiative, held a hearing to determine Faretta's competence to represent himself.[56] Faretta's answers led the court to believe that he did not understand what self-representation entailed.[57] Therefore, the superior court concluded Faretta had not made a knowing and intelligent waiver of counsel.[58] The court then reversed its earlier ruling that allowed Faretta to proceed pro se and appointed a public defender to represent him.[59] Faretta was convicted at trial and appealed on the ground that denial of his request to represent himself violated his Constitutional right to waive counsel.[60] The Supreme Court granted certiorari[61] and reversed.[62]

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it necessarily implies a right to waive that assistance. The Court also analyzed Anglo-American legal traditions of self-representation as implying the right to self-representation. *See id.*

[53] *See Faretta*, 422 U.S. at 807. Anthony Faretta was charged with grand theft in an information filed in Los Angeles County. *See id.*

[54] *See id.* at 808. Faretta indicated that he had represented himself before, that he was a high school graduate, and that he wished to represent himself because he believed the public defender was too busy to effectively represent him. *See id.*

[55] *See id.* Prior to *Faretta*, courts routinely questioned defendants wishing to proceed pro se in an effort to determine the extent of their legal knowledge and to warn them of the equal treatment they would receive. *See Faretta*, 422 U.S. at 808.

[56] *See Faretta*, 422 U.S. at 808. Under the then-applicable California Supreme Court case *People v. Sharp*, 499 P.2d 489 (Cal. 1972), the judge inquired into Faretta's ability to conduct his own defense and questioned him specifically about the hearsay rule and the state law governing the challenge of potential jurors. *See id.*

[57] *See id.*

[58] *See id.* at 809-810.

[59] *See id.* at 810.

[60] *Faretta*, 422 U.S. at 811. Faretta claimed the trial court denied his Sixth Amendment right to waive counsel. *See id.*

[61] *See id.* at 812. On appeal, the California Court of Appeal affirmed the trial judge's ruling that Faretta had no federal or state constitutional right to represent

The Supreme Court held that a criminal defendant has the right to proceed without counsel when the decision to do so is made voluntarily and intelligently.[63] The Court concluded that although a pro se defendant may "conduct his own defense ultimately to his own detriment, his choice must be honored."[64] Further, the Court acknowledged that, historically, self-representation was traditionally permitted in the Anglo-American legal system.[65]

In *Faretta*, the Supreme Court laid the groundrules for all future criminal defendants who decide to proceed pro se. So long as a defendant can show that he has intelligently, voluntarily, and unequivocally waived his right to counsel, he is free to proceed pro se.[66] However, the decision to represent oneself has its share of problems, some of which were discussed by

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himself based on a then-recent California Supreme Court decision, *People v. Sharp*, 499 P.2d 489 (Cal. 1972). Accordingly, the appellate court affirmed Faretta's conviction. A petition for rehearing was denied without opinion, and the California Supreme Court denied review. The Supreme Court then granted certiorari. *See id.*

[62] *See id.* at 836.

[63] *See Faretta,* 422 U.S. at 835. The Supreme Court explained that the Sixth amendment does not expressly grant the right to self-representation, but that it is necessarily "implied" by the amendment's structure. This implied right, the Court explained, is derived from the language of the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." The Court reasoned that to force counsel upon a defendant would violate the logic of the Sixth Amendment because the Amendment refers to the "assistance" of counsel, which implied that the role of the attorney is subordinate to that of the client. Thus, where counsel is forced upon an unwilling defendant, the attorney becomes the "master" and the right to make a defense is stripped of the personal character upon which the Amendment insists. *See id.* at 808.

[64] *Id.* at 834. The Court reasoned that because it is the defendant who suffers the consequences if the defense fails, the determination of how to proceed and with whom lies with the defendant. *Id.*

[65] *See id.* at 821-832. Analyzing the history of self-representation, the Court looked as far back as 16th and 17th century England, the colonial underpinnings of the Sixth Amendment, and §35 of the Judiciary Act of 1789 which provided that "parties may plead and manage their own causes personally or by the assistance of ...counsel." *See Faretta,* 422 U.S. at 821-832.

[66] *See Faretta,* 422 U.S. at 832.

four justices dissenting from the majority *Faretta* opinion. [67] Justice Blackmun, in a separately written dissent cautioned that the procedural ramifications of *Faretta* would "haunt the trial of every defendant who elects to exercise his right to self-representation."[68]

B. DEFINING THE COURT'S DUTIES

After *Faretta*, courts were faced with the task of interpreting, refining and developing feasible procedural mechanisms to implement the right to self-representation. In *Faretta*, the Supreme Court established a standard procedure which all lower courts must follow. Additionally, courts have developed numerous sub-issues of the right to self-representation to meet concerns not foreseen when *Faretta* was decided.

In *Godinez v. Moran*,[69] the Supreme Court established the inquiry required to allow a defendant to proceed pro se.[70] The Court held that trial courts must follow a four-part inquiry to establish a valid waiver of counsel.[71] The four parts are: 1) the accused must understand the nature of the charges against

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[67] *See Faretta*, 422 U.S. at 836-845 (Burger, C.J., dissenting). Three of the four dissenting justices, Chief Justice Burger, Justice Blackmun and Justice Rehnquist, insisted that no independent constitutional basis supports the right to self-representation. *See id.* at 844. They argued that no such right is "tucked between the lines of the Sixth Amendment." *Id.* at 837. Rather, they argued, the Sixth Amendment expressly omitted the right to self-representation, implying the right's exclusion by the framers. *See id.* at 844. Further, Chief Justice Burger contended that the majority decision would add congestion in the courts and the quality of justice would suffer, leading to waning public confidence in a judicial system that allowed obtaining easy convictions against lay defendants. *See id.* at 839-845.

[68] *Faretta*, 422 U.S. at 852 (Blackmun, J., dissenting). Justice Blackmun's concerns included whether every defendant must be advised of the right to self-representation, how waiver should be measured, whether their existed a right to standby counsel, whether a defendant may switch mid-trial, how soon in the proceeding must a defendant decide to proceed pro se, whether a violation of the right to self-representation could ever constitute harmless error, and how a court is to treat a pro se defendant. *See id.*

[69] 509 U.S. 389 (1993).

[70] *See id.*

[71] *See Godinez v. Moran*, 509 U.S. 389, 390 (1993) (citing *Faretta*, 422 U.S. 806 (1975)).

him; 2) the accused must be able to assist in his defense; 3) the accused must know the consequences of entering a guilty plea; and 4) the accused must be able to waive the right of counsel knowingly and intelligently.[72] In *Godinez*, a defendant charged with murder waived his right to counsel and proceeded pro se.[73] After conviction at trial, he appealed, contending he was incompetent to waive his right to counsel because he was not competent to conduct his own defense.[74] The Court, relying on *Faretta*, held that a defendant need not have legal training or an understanding of the rules of court or evidence to proceed pro se.[75] Rather, the Court requires only that a defendant make a knowing, intelligent, and unequivocal waiver under *Faretta*.[76] Therefore, the Court determined that for a defendant to proceed pro se, the competency standard required to waive the right to counsel is the minimum required to stand trial.[77]

The Ninth Circuit further defined how *Faretta* should be applied by determining the competency level required to waive counsel. In *United States v. Arlt*,[78] the Ninth Circuit held that the trial court could not assess a defendant's capacity to formulate a petition when determining defendant's request to proceed pro se.[79] Citing *Godinez*, the Ninth Circuit reasoned that a defendant's competency to proceed pro se must be de-

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[72] *See id.* at 392.

[73] *See id.*

[74] *See id.* at 393.

[75] *See id.* at 394.

[76] *See Godinez*, 509 U.S. at 393-394. Applying this standard, the Court held that the defendant had competently waived his right to counsel and upheld his conviction. *See id.*

[77] *See id.* at 399. The Court explained that there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights because the competence required to waive counsel is the competence to waive the right; not the competence to represent himself. The Court held this standard is the "rational understanding standard." *Id.*

[78] 41 F. 3d. 516 (9th Cir. 1994).

[79] *See id.* at 518. The petition is described as "a rambling and illogical petition with without legal basis or merit." *Id.*

termined by his competency to stand trial, not by the defendant's ability to represent himself.[80] The Ninth Circuit, citing *Godinez*, held that the defendant was competent to waive counsel because he was competent to stand trial.[81]

Since *Faretta*, the Ninth Circuit has consistently followed the guidelines set forth in *Faretta* to establish an intelligent and knowing waiver of the right to counsel. For example, in *United States v. Van Krieken*,[82] the Ninth Circuit held that the defendant had made a knowing and intelligent waiver under *Faretta*, finding that his choice was made "with his eyes open."[83] The *Van Krieken* court followed *Faretta* by requiring that a waiver be knowing, intelligent, and voluntary.[84] The court determined that the defendant on numerous occasions sought to waive counsel and each time was apprised of dangers and consequences of proceeding pro se.[85] Therefore, the court concluded that Van Krieken had made a valid waiver of his right to counsel.[86]

The Ninth Circuit has maintained similarly strict applications of *Faretta* to determine if waivers of counsel are effective. In *United States v. Balough*,[87] the Ninth Circuit relied on *Faretta* by requiring a defendant to be apprised of the dangers and disadvantages of self-representation before being allowed to proceed pro se.[88] In *Balough*, the trial court never warned the defendant that he would be at a disadvantage by proceed-

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[80] *See id.* at 518.

[81] *See id.*

[82] *United States v. Van Krieken*, 39 F.3d. 227 (9th Cir. 1994).

[83] *Id.* at 229 (citing *Faretta*, 422 U.S. at 820).

[84] *See id. See also Faretta*, 422 U.S. 806.

[85] *See Van Krieken*, 39 F.3d at 229. For example, the court apprised the defendant of his right to an attorney and stated that one would be appointed if he could not afford one. The court also explained each charge and the possible penalties. *Id.*

[86] *See id.* at 231.

[87] 820 F. 2d. 1485 (9th Cir. 1987)

[88] *See id.* at 1488.

ing pro se.[89] Further, the trial court failed to warn how an attorney would be able to assist him in overcoming those disadvantages.[90] Consequently, the court held that Balough had not knowingly and intelligently waived his right to counsel.[91]

The Ninth Circuit has also invalidated waivers under *Faretta* because lower courts failed to determine whether the waiver was knowing & intelligent. For example, in *United States v. Mohawk*,[92] the Ninth Circuit held that a defendant did not knowingly and intelligently waived his right to counsel because the trial court failed to apprise the defendant of the nature of the charges and possible penalties.[93] The Ninth Circuit held that the state failed to prove an intelligent and knowing waiver because the state failed to provide a record of the defendant engaging in a colloquy with the court in which he was "informed" of the charges against him and the possible penalties related to those charges.[94]

The Ninth Circuit has consistently applied the *Faretta* standard in determining issues related to the right to counsel.[95] However, once a court determines that a defendant has competently waived counsel and allows the defendant to proceed pro

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[89] *See id.* at 1489.

[90] *See id.*

[91] *See id.* at 1490. *See also* United States v. Keen, 96 F. 3d. 425 (9th Cir. 1996).

[92] 20 F.3d. 1480 (9th Cir. 1994).

[93] *See id.* at 1483.

[94] *See id.* Relying on the *Faretta* holding that the state bears the burden of showing the validity of the defendant's waiver of trial counsel, the court concluded that the state had failed to meet it's burden by not being able to produce a record of the defendant's colloquy with the lower court. *See id.*

[95] *See* United States v. Arlt, 41 F.3d 516 (9th Cir. 1994); United States v. Balough, 820 F.2d 1485 (9th Cir. 1987); United States v. Mohawk, 20 F.3d 1480 (9th Cir.1994); United States v. Van Krieken, 39 F.3d 227 (9th Cir.1994); United States v. Keen, 96 F.3d 425 (9th Cir. 1996); United State v. Robinson, 913 F.2d 712 (9th Cir. 1990); Savage v. Estelle, 908 F.2d 508 (9th Cir. 1990); United States v. Kimmel, 672 F.2d 720 (9th Cir. 1982).

se, issues such as standby counsel and access to legal materials affect the defendant's right to a fair trial.[96]

C. STANDBY COUNSEL AND THE RIGHT TO SELF-REPRESENTATION

The *Faretta* Court recognized the value of standby counsel in protecting the interests of the pro se criminal defendant.[97] The Court stated that a trial court may appoint standby counsel to assist a pro se defendant in the presentation of his defense if the court finds that it is necessary.[98] Additionally, Chief Justice Burger in his dissent stated, "some of the damage we can anticipate from a defendant's ill-advised insistence in conducting his own defense may be mitigated by appointing a qualified lawyer to sit in the case as the traditional 'friend of the court.'"[99]

In *Mayberry v. Pennsylvania*,[100] Chief Justice Burger, in a concurring opinion, cited several reasons that a trial judge would be "well-advised" to appoint standby counsel when a de-

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[96] *See* John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 SETON HALL CONST. L.J. 483, 523-535 (1996).

[97] *See Faretta*, 422 U.S. at 852.

[98] *Faretta*, 422 U.S. at 834-835 n.46. The Court stated, "Of course, a State may – even over the objection by the accused – appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Id.* The Court assigned standby counsel the functions of assisting the defendant if requested and, at the extreme, rescuing an accused in the event that termination of her self-defense is necessary. *See id.* Counsel can even be appointed over the defendant's objection. *See id.* All of these possibilities reside however, in the judicial basement of a footnote. This leaves the appointment of standby counsel as apparently nothing more than something the court is free to offer to criminal defendants should the judge see fit. *See* John H. Pearson, *Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial*, 72 CAL. L. REV. 697, 713 (1984).

[99] *Faretta*, 422 U.S. at 846 n.7 (Burger, C.J., dissenting). Justice Burger makes this suggestion in light of the impact *Faretta* may have on judicial efficiency and efficacy. He notes, "the newfound right to self-representation would create "added congestion in the courts and the quality of justice would suffer." *Id.* at 846.

[100] 400 U.S. 455 (1971).

fendant seeks to represent himself.[101] For example, standby counsel may assist the defendant in the event he is removed from the courtroom for disruptive behavior.[102] Further, standby counsel may intervene when the defendant realizes he lacks an appreciation of the consequences of his waiver and is unable to continue to represent his interest.[103] Ultimately, Chief Justice Burger stated that no limitations existed, constitutional or otherwise, on a trial judge's absolute discretion to appoint standby counsel.[104]

In *McKaskle v. Wiggins*,[105] the United States Supreme Court directly addressed the issue of standby counsel's effect on the right to self-representation.[106] In *McKaskle*, the pro se defendant claimed that standby counsel interfered with his right to self-representation.[107] The Court held that standby counsel's participation did not impair the defendant's *Faretta* rights.[108] Rather, the Court held that standby counsel may be appointed at the discretion of the inquiring tribunal so long as

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[101] *Mayberry*, 400 U.S. at 468 (Burger, C.J., concurring). He also noted that if standby counsel were appointed, the defendant may consult with counsel, resolve his questions, and then continue to adequately represent himself. He concluded that the presence of standby counsel relaxes the duty on the part of the trial judge who maintains an extra burden during trials where a defendant is exercising his Faretta rights. *See id.*

[102] *See id.* at 468.

[103] *See id.*

[104] *See id.* He wrote, "[i]n every trial there is more at stake than just the interests of the accused; the integrity of the process warrants a trial judge's exercising his discretion to have counsel participate in the defense even when rejected...The value of the precaution of having independent counsel, even if unwanted, is underscored by situations where the accused is removed from the courtroom." *See Mayberry*, 400 U.S. at 465.

[105] 465 U.S. 168 (1984).

[106] *See id.* at 173.

[107] *See id.* The defendant claimed that his right to self-representation was compromised by standby counsel repeatedly interjecting during defendant's defense and arguing with the defendant over his defense. *See id.* at 174.

[108] *See id.* at 175. The Court reasoned that standby counsel might provide the pro se litigant with needed assistance since the pro se status of a criminal defendant does not excuse the defendant from normal procedural rules. *See McKaskle*, 475 U.S. at 184.

standby counsel allows the defendant actual control over the case and does not destroy the jury's perception that the defendant is representing himself.[109] Finally, the Court determined that standby counsel may assist a pro se defendant in overcoming procedural and evidentiary obstacles without interfering with McKaskle's *Faretta* rights.[110]

The Ninth Circuit has also discussed standby counsel's role in the pro se defense. In *United States v. Robinson*,[111] the Ninth Circuit addressed the defendant's use of standby counsel and the pro se defendant's access to materials in preparation for trial.[112] In *Robinson*, the defendant decided to proceed pro se and in response, the district court appointed standby counsel prior to trial.[113] Robinson was convicted at trial and on appeal, argued that his right to self-representation had been compromised because standby counsel had failed to assist in providing an adequate defense.[114] The Ninth Circuit held that conflicts with standby counsel do not abrogate the defendant's right to self-representation because the Sixth Amendment does not compel counsel to blindly follow defendant's instruction.[115] The court concluded that Robinson had made a valid waiver of

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[109] *See McKaskle*, 475 U.S. at 178. The Court noted that standby counsel's participation over the defendant's objection, allowing counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, would erode defendant's *Faretta* right. *See id.*

[110] *See id.* at 183. Obstacles include introducing evidence or objecting to testimony, which the defendant has clearly shown he wishes to complete. Counsel may also assist to ensure the defendant's compliance with basic rules of courtroom protocol and procedure. *See id.*

[111] 913 F. 2d 712 (9th Cir. 1990).

[112] *See id.*

[113] *See id.* at 715.

[114] *See id.* at 716. Robinson had numerous tactical disagreements with appointed standby counsel and felt the court's refusal to take this into consideration violated his right to self-representation. *See id.*

[115] *See Robinson*, 913 F.2d at 715-716.

the right to counsel and that his dissatisfaction with appointed standby counsel could not constitute reversible error.[116]

Additionally, Robinson argued that he was forced to accept standby counsel as the only alternative to having limited access to legal materials.[117] Specifically, the court noted that requiring a defendant to choose between appointed counsel and access to legal materials does not violate the Sixth Amendment.[118] The court determined that limited access to legal materials for pro se defendants was constitutional because the limitation conforms to perceived needs of prison management.[119] In this context, the court held that a defendant may be made to choose between appointed counsel and access to legal materials because the Sixth Amendment is satisfied by the offer of professional representation alone.[120] So long as an alternative to standby counsel does not offend the Constitution, it will be upheld.[121]

The Ninth Circuit further defined the role of standby counsel by increasing the level of standby counsel's participation. In *United States v. Kimmel*,[122] the Ninth Circuit held that the district court may allow a hybrid form of representation.[123] Hybrid representation allows the accused to assume some of the attorney's functions, so long as the accused makes a valid

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[116] *See id.*

[117] *See id.* at 717. Robinson's limited access to legal materials consisted of the district court's decision to allow Robinson only one box of legal materials. Prior to the order, Robinson had accumulated six boxes of legal materials. *See id.*

[118] *See id.* at 717-718.

[119] *See Robinson*, 913 F.2d at 718. The court alluded to security considerations and the limitations of the penal system as reasons for limiting defendant's access to legal materials. Furthermore, the court noted the defendant was offered opportunities to transfer to another jail and conduct more expansive research there; something defendant turned down because he felt the offered facility was "too crowded." *Id.*

[120] *See id.* at 717.

[121] *See id.*

[122] 672 F. 2d 720 (9th Cir. 1981).

[123] *See id.*

waiver.[124] In *Kimmel*, a defendant charged with a drug-related offense elected to proceed pro se and the court appointed standby counsel to assist in his defense.[125] Although standby counsel actively argued before the jury and acted as the dominant spokesperson for the defense, the court noted that counsel did not assume all the duties of retained or appointed counsel.[126] In this context, the Ninth Circuit concluded that a "hybrid' form of standby counsel is constitutional, so long as the defendant's waiver of counsel comports with the *Faretta* requirements.[127]

However, the Ninth Circuit has also limited a defendant's right to proceed pro se. In *Savage v. Estelle,*[128] the Ninth Circuit held that a defendant with a severe speech impediment could not exercise the right of self-representation because he was unable to communicate to the jury.[129] In *Savage*, a defendant charged with assault elected to proceed pro se.[130] After a *Faretta* hearing, the district court granted the defendant's request to proceed pro se.[131] However, standby counsel was appointed to assist the defendant in presenting his case to the jury because of the defendant's severe speech impediment.[132] The Ninth Circuit relied on *McKaskle*[133] where they earlier denied the defendant the opportunity to proceed pro se because he was unable to abide by courtroom procedure.[134] Citing *McKaskle*, the Ninth Circuit held that allowing standby coun-

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[124] *See Kimmel*, 672 F. 2d at 721.

[125] *See id.*

[126] *See id.*

[127] *See id.*

[128] 908 F. 2d 508 (9th Cir. 1990).

[129] *See id.* at 509.

[130] *See id.* The defendant decided to proceed pro se during pre-trial motions. *See id.*

[131] *See id.*

[132] *See Savage*, 908 F.2d at 509.

[133] 465 U.S. 168 (1984).

[134] *See id.* at 173.

sel to handle the core functions of the defense did not violate defendant's right to self-representation when the defendant is unable to competently present his case to the jury.[135]

Faretta and its progeny established a procedural minimum standard, implied under the Sixth Amendment, which must be met before a criminal defendant will be allowed to represent himself.[136] This standard requires a trial court to engage in a colloquy with the defendant to ensure that the defendant is literate, competent, understanding, that he or she knowingly and voluntarily intends to waive his or her Sixth Amendment right to counsel, and that the defendant is aware of the dangers and disadvantages of self-representation.[137] Once these facts are established, the court may grant the waiver and allow the defendant to proceed pro se.[138] The defendant is expected, however, to present a defense conforming to the court and evidentiary rules.[139] Furthermore, a defendant is barred from raising issues of ineffective assistance of counsel as a basis for appeal when he conducts a pro se defense or is assisted by standby counsel in that capacity.[140] Thus, the need for the informed and effective exercise of the right to self-representation is crucial. In this regard, standby counsel has become an important aspect of the right to self-representation.[141]

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[135] *See Savage*, 908 F.2d at 515.

[136] *See Faretta*, 422 U.S. at 834.

[137] *See* Frederic Paul Gallun, *The Sixth Amendment Paradox: Recent Developments on the Right to Waive Counsel Under Faretta*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 559, 563 (1997).

[138] *See id.*

[139] *See id.*

[140] *Faretta*, 422 U.S. at 834-835 n. 46. The Court explained, "The right to self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel'" *Id.*

[141] *See* Decker, *supra* note 96, at 523-524.

D. CURRENT CASE LAW: *MARTINEZ V. COURT OF APPEAL OF CALIFORNIA*

Despite *Faretta's* influence in the Sixth Amendment jurisprudence of the past twenty years, a recent case reveals the United States Supreme Court's divergence from key aspects of *Faretta's* analysis. In *Martinez v. California Court of Appeal*,[142] the Court addressed the right to self-representation in appellate proceedings.[143] Defendant, a paralegal, was charged with grand theft and embezzlement of client funds.[144] Martinez elected to proceed pro se.[145] He was subsequently convicted and filed a timely notice of appeal along with a motion for self-representation to the California Court of Appeal.[146] The court denied his motion, holding that denial of self-representation at the appellate level does not violate due process or equal protection guarantees.[147]

The Supreme Court affirmed California's decision, stating three reasons why *Faretta* was inapplicable.[148] First, the Court reasoned that *Faretta* relied on outmoded information.[149] Specifically, the *Martinez* Court stated that the historical right to self-representation "pertained to times when lawyers were scarce, often mistrusted, and not readily available to the average person accused of crime."[150] Second, the Court found *Faretta's* reliance on the Sixth Amendment's structure and history inapplicable because the Amendment did not contemplate the right to counsel in appellate proceedings.[151] Third, the Court reasoned that the right to waive counsel is not

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[142] 120 S.Ct. 684 (2000).

[143] *See id.*

[144] *See id.* at 686.

[145] *See id.* at 687.

[146] *See id.*

[147] *See Martinez*, 120 S.Ct. at 687.

[148] *See id.* at 686.

[149] *See id.*

[150] *Id.* at 688.

[151] *See id.* at 690.

absolute.[152] Rather, the Court noted that the risk of disloyalty by a court-appointed attorney, or the suspicion of such disloyalty, that underlies the right of self-representation at trial is insufficient to warrant its necessity at the appellate level.[153]

Martinez reflects a shift in the Court's application of *Faretta*. The Court recognized the failings of self-representation, stating, "experience has taught us that 'a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney.'"[154] Furthermore, the Court remarked in a footnote that "even at the trial level, the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."[155] Nevertheless, *Faretta* is still valid law because the Court's decision in *Martinez* only applies to *appellate* self-representation.[156] Moreover, *Martinez* tacitly recognized the right to self-representation at the trial level.[157]

IV. THE NINTH CIRCUIT'S ANALYSIS

In *United States v. Farhad*,[158] the Ninth Circuit confirmed the right to self-representation by following *Faretta's* holding that a knowing, intelligent and unequivocal waiver represents a valid waiver of the right to counsel.[159] In determining whether Farhad's waiver was valid, the court addressed the "knowing, intelligent, and unequivocal" requirements with the understanding that the burden of proving a waiver's legality

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[152] *Martinez*, 120 S.Ct. at 691.

[153] *See id.* at 690-691.

[154] *See id.* at 691 (citing Decker, *supra* note 96, at 598).

[155] *Martinez*, 120 S.Ct. at 691.

[156] *See id.* at 692.

[157] *See id.*

[158] 190 F.3d 1097 (9th Cir. 1999).

[159] *See Farhad*, 190 F.3d at 1100.

rests with the state, "indulging every reasonable presumption against the waiver."[160]

A. KNOWING AND INTELLIGENT WAIVER

Citing *Faretta* and Ninth Circuit precedent,[161] the court restated the rule that a waiver of counsel is "knowing and intelligent" only if the defendant is aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation.[162] Accordingly, the Ninth Circuit determined that the record must establish that "[the defendant] knows what he is doing and his choice is made with his eyes open."[163] The Ninth Circuit also noted that the preferred procedure is for each component of the rule to be discussed separately in open court.[164]

Analyzing the three "knowing and intelligent" factors, the Ninth Circuit determined that the district court "conscientiously conducted the appropriate inquiry."[165] The district court informed Farhad of the charges against him and of the possible penalties each charge carried.[166] The district court

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[160] *See id.* at 1099-1100.

[161] *See* United States v. Arlt, 41 F.3d 516 (9th Cir. 1994); United States v. Balough, 820 F.2d 1485 (9th Cir. 1987); United States v. Mohawk, 20 F.3d 1480 (9th Cir.1994); United States v. Van Krieken, 39 F.3d 227 (9th Cir.1994); United States v. Keen, 96 F.3d 425 (9th Cir. 1996); United State v. Robinson, 913 F.2d 712 (9th Cir. 1990); Savage v. Estelle, 908 F.2d 508 (9th Cir. 1990); United States v. Kimmel, 672 F.2d 720 (9th Cir. 1982).

[162] *See Farhad,* 190 F.3d at 1099.

[163] *Farhad,* 190 F.3d at 1009 (citing United States v. Balough, 820 F.2d 1485 (9th Cir. 1987).

[164] *See id.* The majority acknowledged that as soon as Farhad requested to proceed pro se, the trial judge immediately held a hearing in open court to determine the validity of Farhad's waiver. *See id.*

[165] *Farhad,* 190 F.3d at 1099.

[166] *See id.* at 1098. The district court judge informed Farhad that he was charged with 19 counts, informed him of the maximum penalty on each count, and pointed out the potential consequences for him in state prison if he incurred a new federal conviction. *See id.*

also discussed the disadvantages of self-representation.[167] Further, Farhad repeated his desire to provide his own defense, despite the district court's numerous warnings that he was "making it hard on himself."[168] Based on these facts, the Ninth Circuit concluded that Farhad had made a knowing and intelligent waiver.[169]

B. UNEQUIVOCAL WAIVER

In addition to the knowing and intelligent requirement, the Ninth Circuit stated that a valid waiver must be unequivocal.[170] In its reasoning, the Ninth Circuit analogized the facts in *Farhad* to those in *Van Krieken*.[171] In *Van Krieken*, the defendant made numerous requests to waive counsel despite warnings of the dangers and disadvantages of proceeding pro se.[172] The Ninth Circuit held that these numerous requests constituted an unequivocal decision to proceed pro se.[173] Similarly in *Farhad*, the Ninth Circuit noted that Farhad's repeated requests to proceed pro se indicated his unequivocal waiver of his right to counsel and not "mere whim or caprice."[174]

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[167] *See id.* The majority found that the district court adequately warned Farhad by informing him of the "core functions" of an attorney. The Ninth Circuit also noted that the district court warned Farhad that he would be expected to perform those functions at trial. The majority also determined that the district court warned Farhad that he would be expected to ask questions, make arguments, and observe the rules of evidence and courtroom procedure. *See id.*

[168] *See Farhad*, 190 F.3d at 1098-1099. After the initial hearing, Farhad reaffirmed his choice to proceed pro se on at least two separate occasions. First, when he was denied standby counsel and second, when the court refused his request for an investigator. On both occasions, the court warned Farhad of the disadvantages of proceeding pro se but Farhad maintained his position. *See id.*

[169] *See id.* at 1100.

[170] *See id.* (citing *Van Krieken*, 39 F.3d at 229 (9th Cir. 1994)).

[171] *See Farhad*, 190 F.3d at 1100.

[172] *See* Van Krieken, 39 F.3d at 227, 229 (9th Cir. 1994).

[173] *See id.* at 230.

[174] *Farhad*, 190 F.3d at 1100.

C. THE MERITS OF *FARETTA*

The Ninth Circuit denied Farhad's request to reconsider the validity of the right to self-representation in criminal trials as recognized in *Faretta*.[175] Relying on state and federal court decisions, the Ninth Circuit concluded that Farhad's request for an advisory opinion on *Faretta* would be an improper exercise of the court's discretion.[176]

The Ninth Circuit also noted that courts have expanded the *Faretta* right.[177] Specifically, the court discussed *Godinez v. Moran* which extended the *Faretta* right to all criminal defendants, including those who are mentally impaired.[178] The Ninth Circuit reasoned that the "overwhelming weight" of precedent supported its refusal to review the *Faretta* decision.[179] Concluding that the *Faretta* right to self-representation is firmly established, the Ninth Circuit held that Farhad had knowingly, intelligently, and unequivocally waived his right to counsel under the Sixth Amendment.[180]

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[175] *See id.* at 1100-1101. On appeal, Farhad requested the Ninth Circuit to reconsider the validity of *Faretta*. *See id.*

[176] *See Farhad,* 190 F.3d at 1101. The court noted that the Ninth Circuit had published "dozens of opinions" applying *Faretta*, specifically citing cases discussed herein. *See* United States v. Arlt, 41 F.3d 516 (9th Cir. 1994); United States v. Balough, 820 F.2d 1485 (9th Cir. 1987); United States v. Mohawk, 20 F.3d 1480 (9th Cir.1994); United States v. Van Krieken, 39 F.3d 227 (9th Cir.1994); United States v. Keen, 96 F.3d 425 (9th Cir. 1996); United State v. Robinson, 913 F.2d 712 (9th Cir. 1990); Savage v. Estelle, 908 F.2d 508 (9th Cir. 1990); United States v. Kimmel, 672 F.2d 720 (9th Cir. 1982).

[177] *See Farhad*, 190 F.3d at 1100.

[178] *See id.* (citing *Godinez v. Moran*, 509 U.S. 389 (1993)). The Ninth Circuit held that a defendant may waive his right to counsel so long as they are "competent to stand trial." *Id.*

[179] *See Farhad,* 190 F.3d at 1101.

[180] *See id.* at 1100.

D. JUDGE REINHARDT'S CONCURRING OPINION

Judge Reinhardt agreed with the majority that Farhad had constitutionally waived his right to counsel.[181] However, Judge Reinhardt concluded that even if Farhad's waiver comported with the United States Constitution, his trial did not.[182] Judge Reinhardt noted that though *Faretta* has been continually reaffirmed,[183] the Court has never addressed the *Faretta* dissenters' concerns "that a conviction in a proceeding so fundamentally flawed that, were it not for *Faretta,* would undoubtedly offend minimum constitutional standards of fairness."[184]

1. The Right to a Fair Trial and the Sixth Amendment

The Constitution guarantees every defendant the fundamental, absolute right to a fair trial. Judge Reinhardt argued that, unlike the right to a fair trial, the right to counsel and the implied right to self-representation are not absolute rights.[185] Rather, the right to counsel is like all other procedural guarantees of the Sixth Amendment, all of which must yield to the substantive right.[186]

Quoting the Supreme Court in *Estes v. Texas*,[187] Judge Reinhardt noted, "the right to a fair trial is the most fundamental of all freedoms," essential to the preservation and enjoyment of all other rights.[188] Judge Reinhardt further stated that the provisions of the Sixth Amendment are best viewed as "institutional safeguards for attaining the overarching objec-

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[181] *See id.* at 1101.

[179] *See id.* at 1101-1102. Judge Reinhardt noted that Farhad's fundamentally flawed performance at trial violated his Fifth Amendment right to a fair trial. *Id.*

[183] *See supra* notes 51-157 and accompanying text.

[184] See *Farhad*, 190 F.3d at 1101 (citing *Faretta*, 422 U.S. at 820, (Burger, C.J., dissenting)).

[185] *See id.*

[186] *See id.* Judge Reinhardt argued Sixth Amendment guarantees are a "means to achieve the substantive objective of the fair trial." *Id.*

[187] 381 U.S. 532 (1965).

[188] *See Farhad,* 190 F.3d at 1105 (citing Estes v. Texas, 381 U.S. 532 (1965)).

tive of a fair trial."[189] Judge Reinhardt argued that permitting self-representation regardless of the consequences threatens to "divert" criminal trials from their "clearly defined purpose" of providing a "fair and reliable determination."[190]

Judge Reinhardt also criticized the court's decision to carry the *Faretta* holding to its illogical conclusion by holding that any defendant, even one who is severely mentally impaired, has the right to proceed pro se so long as he is minimally competent.[191] He also lamented the court's expansion of those eligible to be pro se defendants to include juveniles and illiterates.[192] This expansion of the *Faretta* right, Judge Reinhardt concluded, is squarely opposed to the guarantee of a fair trial.[193]

2. *Waiving the Right to a Fair Trial*

Judge Reinhardt addressed the issue of whether a defendant may waive his right to a fair trial.[194] He concluded that he may not, reasoning that the government has a compelling interest, related to its own legitimacy, in ensuring both fair procedures and reliable outcomes in criminal trials, both of which are thwarted when an incapable or incompetent defendant proceeds pro se.[195] Conversely, Judge Reinhardt pointed to the justification for allowing a defendant to waive his right to counsel under *Faretta* because "it is he who suffers the consequences if his defense fails."[196] However, Judge Reinhardt concluded that waving the right to a fair trial creates a larger

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[189] *Farhad,* 190 F.3d at 1106 (citing Estes v. Texas, 381 U.S. 532 (1965)).

[190] *Id.*

[191] *See Farhad,* 190 F.3d at 1106 (citing *Godinez,* 509 U.S. at 389).

[192] *See Farhad,* 190 F.3d at 1107 (citing Peters v. Gunn, 33 F.3d 1190 (9th Cir. 1994)); *See also* Barry C. Feld, *The Right to Counsel in Juvenile Court: Empirical Study of When Lawyers Appear and the Difference They Make,* 79 J. CRIM. L. & CRIMINOLOGY 1185 (1989).

[193] *See Farhad,* 190 F.3d at 1105-1106.

[194] *See id.* at 1108.

[195] *See id.*

[196] *Farhad,* 190 F.3d at 1107 (citing Faretta v. California, 422 U.S. 806 (1975)).

problem because the right to a fair trial implicates not only the interests of the individual defendant, but the "institutional interests" of the judicial system.[197] He stated that "not only the defendant 'suffers the consequences' when a fair trial is denied, but the justice system itself."[198]

Judge Reinhardt then discussed the issue of whether the Fifth Amendment right to a fair trial may be implicitly waived as it was in *Farhad*.[199] Judge Reinhardt concluded that it may not be. Citing *Brewer v. Williams*,[200] he noted that waivers of constitutional rights are disfavored, and that courts indulge every reasonable presumption against them.[201] Thus, he concluded, when waiving a right as important as the right to a fair trial, "waiver by implication would appear highly inappropriate."[202]

3. Procedural Concerns

Judge Reinhardt pointed out that a strict *Faretta* inquiry creates a judiciary "with eyes wide shut."[203] He concluded that after the pre-trial stages in which the *Faretta* inquiry occurs, the constitutionality of the trial is rendered irrelevant.[204] Furthermore, he noted that an inquiry into the constitutionality of a hearing is determined by reviewing the entire proceeding, including the trial itself to determine whether it comports with constitutional standards of fairness.[205] Judge Reinhardt concluded that *Farhad* is a prime example of the judiciary "avert-

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[197] *See id.* at 1107.

[198] *Id.*

[199] *See id.* at 1108.

[200] 430 U.S. 387 (1977).

[201] See *Farhad,* 190 F.3d at 1108 (citing Brewer v. Williams, 430 U.S. 387 (1977)).

[202] *Id.* at 1108.

[203] *See id.* at 1102.

[204] *See id.*

[205] *See id.* at 1105. *See also* Malinski v. New York, 324 U.S. 401 (1945) (holding that judicial review of due process requires an exercise of judgment upon an entire course of a proceeding to determine whether a violation has occurred).

ing its gaze" from Farhad's pitiful attempt to, in his own words, "make a more glorious kind of a defense."[206]

Lastly, Judge Reinhardt discussed the need for balancing the right to self-representation and the right to a fair trial.[207] He pointed out that both require consideration as constitutional rights in the criminal justice system.[208] He continued, "as with most other individual rights, there are competing and countervailing interests, both personal and social."[209] Judge Reinhardt concluded by requesting the courts to "develop rules for determining when the exercise of the right to self-representation would be consistent with the mandate of the Fifth Amendment [right to a fair trial], and when it would not."[210] In conclusion, he noted that the adoption of a rule to delineate the coexistence of seemingly competing rights must be determined by the Supreme Court, not by lower courts.[211]

V. CRITIQUE

Relying on the Supreme Court holding in *Faretta* and subsequent case history, the Ninth Circuit's majority in *Farhad* concluded that the defendant had knowingly, intelligently, and unequivocally waived his Sixth Amendment right to counsel.[212] However, the Ninth Circuit's decision failed to address key procedural and substantive concerns related to the right of self-representation.[213] Those concerns, raised by Justice Blackmun in *Faretta* and again by Justice Reinhardt in *Farhad*, relate to the potential denial of a fair trial in granting

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[206] *Farhad,* 190 F.3d at 1102.

[207] *See id.* at 1108.

[208] *See id.*

[209] *Id.* Judge Reinhardt also wrote that the implied right to self-representation "allows Farhad and others with similar limitations or incapacitates to turn criminal trials into travesties." *Id.*

[210] *See Farhad,* 190 F.3d at 1108.

[211] *See id.* at 1108-1109.

[212] *See* United States v. Farhad, 190 F.3d 1097, 1100 (9th Cir. 1999).

[213] *See Faretta,* 422 U.S. at 852 (Blackmun, J., dissenting).

the defendant's right to proceed pro se.[214] In *Farhad*, the Ninth Circuit conducted the *Faretta* analysis with no attempt to address the fair trial concerns of the defendant or Justice Reinhardt's concurring opinion.[215] The Ninth Circuit merely addressed the validity of the waiver of the right to counsel in a vacuum.[216]

The Ninth Circuit's strict reading of *Faretta* inadequately addressed the conflict between a defendant's right to autonomy and society's interest in maintaining fairness in criminal trials.[217] The importance of the right to a fair trial requires that the court adopt procedures designed to minimize the potentially destructive effects of a defendant's waiver of counsel for the individual defendant and the judicial system as a whole.[218] In *Farhad*, the defendant's desire for autonomy in a criminal trial outweighed the court's concern for a fair trial.[219] Unfortunately, the Ninth Circuit's analysis also failed to balance these interests appropriately.[220]

Though courts are bound by *Faretta* as Supreme Court precedent, later cases from the Supreme Court[221] and the Ninth Circuit[222] have discussed procedures and guidelines to

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[214] *See id. See also Farhad*, 190 F.3d at 1102. Justice Reinhardt's argues the Fifth Amendment right to a fair trial supersedes the procedural rights of the Sixth Amendment. Specifically, he argues that the Fifth Amendment should not be compromised by the right to self-representation when a pro se defendant (i.e., Farhad) conducts a defense that makes a mockery of the judicial system. *See id.*

[215] *See Farhad*, 190 F.3d at 1101.

[216] *See id.* at 1098-1100.

[217] *See id.* at 1108. Agreeing with Judge Reinhardt's concurrence.

[218] *See* John H. Pearson, *Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial*, 72 CAL. L. REV. 697, 713 (1984). Pearson argues for procedural mechanisms such as mandatory standby counsel to counteract the detrimental effects of self-representation on a defendant's right to a fair trial. *See id.*

[219] *See Farhad*, 190 F.3d at 1101.

[220] *See id.* at 1108.

[221] *See* Godinez v. Moran, 509 U.S. 389 (1993); McKaskle v, Wiggins, 465 U.S. 168 (1984).

[222] *See* United States v. Arlt, 41 F.3d 516 (9th Cir. 1994); United States v. Balough, 820 F.2d 1485 (9th Cir. 1987); United States v. Mohawk, 20 F.3d 1480 (9th Cir.1994);

assist the criminal defendant in presenting a pro se defense. This case law indicates that though *Farhad* is bound by *Faretta* as precedent, there is enough flexibility to consider means of protecting both rights essential to a criminal trial: the defendant's need for a fair trial and the importance of the right to self-representation.[223]

The Ninth Circuit in *Farhad* could have better resolved this conflict by addressing two of Farhad's requests to the district court: first, his request for "standby/hybrid" counsel, and second, his request for greater access to legal materials during the district court proceedings.[224] Granting these two requests would have enhanced Farhad's chances of receiving a fair trial under the Fifth Amendment. At the same time, *Faretta* would have been satisfied because Farhad could have maintained his autonomy by controlling his own defense.

A. RECOGNIZING STANDBY COUNSEL'S ROLE

Following *Faretta*, the United States Supreme Court in *McKaskle v. Wiggins*[225] recognized the constitutionality of standby counsel in connection with the right to self-representation.[226] The Court developed a two-part test to determine the constitutionality of standby counsel.[227] First, the pro se defendant must preserve actual control over the case he

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United States v. Van Krieken, 39 F.3d 227 (9th Cir.1994); United States v. Keen, 96 F.3d 425 (9th Cir. 1996); United State v. Robinson, 913 F.2d 712 (9th Cir. 1990); Savage v. Estelle, 908 F.2d 508 (9th Cir. 1990); United States v. Kimmel, 672 F.2d 720 (9th Cir. 1982).

[223] For example, standby counsel has been a principal means of protecting the pro se defendant from the pitfalls of proceeding without counsel. *See* McKaskle v. Wiggins, 465 U.S. 168, 175 (1984).

[224] *See Farhad,* 190 F.3d at 1099.

[225] 465 U.S. 168 (1984).

[226] See *id.* at 169. However, standby counsel is not a right; it is a privilege which is left to the discretion of the trial judge. *See* John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 SETON HALL CONST. L.J. 483, 525 (1996).

[227] *See McKaskle,* 465 U.S. at 178.

chooses to present to the jury.[228] Second, standby counsel's actions should preserve the jury's perception that defendant is conducting his own defense.[229] Furthermore, the pro se defendant should be allowed to address the court freely on his own behalf.[230] If disagreements between standby counsel and the pro se defendant arise, they are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel.[231] The *McKaskle* Court concluded that unsolicited participation of standby counsel may provide a defendant with needed assistance because pro se status does not excuse a defendant from abiding by normal procedural rules.[232]

Ultimately, the pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.[233] These rights, the Court explained,

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[228] *Id.*

[229] *Id.* at 178.

[230] *See id.* at 179.

[231] *See McKaskle,* 465 U.S. at 179.

[232] *See id.* at 183-184. A commentator notes that standby counsel may enter objections or make other moves to further the defense, even against the defendant's will. Counsel may also on her own take steps to aid the defendant in surmounting procedural hurdles, thereby freeing the judge from this task. The defendant, "does not have a constitutional right to receive personal instruction from the trial judge on constitutional procedure," nor is the judge constitutionally required "to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course.'" In setting limits to the pro se right, the court has identified those areas where the efforts can be made to protect the essential fairness and adequacy of trials as required by the Sixth and Fourteenth amendments without violating the Faretta right to self-defense. By expanding the limits within which standby counsel may constitutionally function, *McKaskle* increases the efficacy of such counsel in protecting a defendant's right to a fair trial. Pearson, *Mandatory Advisory Counsel for Pro Se Defendants*, 72 CAL. L. REV. at 704.

[233] *See McKaskle*, 465 U.S. at 173-187. *See also* Frederic Paul Gallun, *The Sixth Amendment Paradox: Recent Developments on the Right to Waive Counsel Under Faretta*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 559 (1997).

represent the crux of the defendant's right to self-representation.[234]

Courts have also expanded the role of standby counsel to that of "hybrid counsel," in which both defendant and attorney present the defense.[235] Though *Faretta* does not guarantee a criminal defendant the constitutional right to hybrid representation, the Ninth Circuit has held otherwise.[236] In the Ninth Circuit, trial courts may at their discretion, grant an accused's request to assume some of the attorney's functions.[237] In *United States v. Kimmel*,[238] the Ninth Circuit held that "the district court has the authority to allow a hybrid form of representation in which the accused assumes some of the lawyer's functions."[239] A hybrid form of standby counsel is a logical remedy for the risks a pro se defense poses to a fair trial.[240] Standby counsel can significantly lessen the negative effects of a pro se defense while maintaining the defendant's right to self-representation.

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[234] *See McKaskle*, 465 U.S. at 173-187. The Court highlighted the following functions Wiggins performed during the course of the trial: 1) filing numerous pro se motions, 2) cross-examining the prosecutions witnesses, 3) registering objections, 4) selecting and examining witnesses, 5) deciding which questions would not be asked by the defense, 6) determining when the defense would rest, 7) making objections to suggested jury charges as well as filing his own jury charges, and 8) giving a closing argument to the jury. The Court held that the defendant's *Faretta* rights were not violated because he had ample opportunity to control his own pre-trial and trial presentations and also, in light of the entire record, any unsolicited participation by standby counsel was reasonable. *Id.* at 174-175.

[235] *See* United States v. Kimmel, 672 F. 2d 720 (9th Cir, 1982).

[236] *See McKaskle*, 465 U.S. at 183. *Faretta* does not require a trial judge to permit "hybrid" representation. *See id.*

[237] *See* Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths – A Dead End?*, 86 COLUM. L. REV. 9 (1986) (explaining that courts often reject hybrid representation on the basis of "efficiency considerations as well as solicitude for the attorney"). While trial courts in all jurisdictions adhere to some fundamental rules concerning hybrid representation, courts in most jurisdictions routinely deny requests for any form of mixed representation. *Id.*

[238] 672 F. 2d 720 (9th Cir. 1982).

[239] *Id.* at 721.

[240] *See* Pearson, *supra* note 218, at 713.

However, hybrid counsel should not be limited to cases dependent on the court's exercise of discretion. Rather, hybrid counsel should be mandatory in all cases where a criminal defendant elects to proceed pro se because most defendants do not fully appreciate the risks involved in self-representation, regardless of the *Faretta* inquiry.[241] Furthermore, the benefits of hybrid counsel far outweigh its disadvantages. For example, hybrid counsel protects the lay defendant from procedural and evidentiary pitfalls, many of which Farhad suffered.[242] The only arguable disadvantage may be that the defendant's autonomy is compromised. However, under *McKaskle*, the defendant controls the defense, ensuring his autonomy is protected on a certain level.[243] The defendant may utilize hybrid counsel to the extent necessary to adequately represent his case. In *Farhad*, the defendant requested this type of shared representation and the district court denied his request, laying the foundations for Farhad's failure at trial.[244]

B. THE NINTH CIRCUIT FAILED TO RECOGNIZE FARHAD'S NEED FOR HYBRID COUNSEL

The district court in *Farhad* appointed standby counsel.[245] However, Farhad requested a "hybrid form" of representation which allowed him to make opening and closing statements and exercise challenges during jury selection.[246] The district court flatly rejected Farhad's request.[247] If the district court had granted his request, Farhad would not have had the op-

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[241] *See id.* at 713-715.

[242] *See Farhad*, 190 F.3d at 1102-1104.

[243] *See McKaskle*, 465 U.S. at 178.

[244] *See Farhad*, 190 F.3d at 1099.

[245] *See id.*

[246] *See id.*

[247] *See id.* The court responded: "It cannot be done that way. You do it all or [the public defender] does it all." *Id.*

portunity to make a mockery of the trial system with his "more glorious kind of defense"[248]

"Hybrid representation" in *Farhad* would have satisfied constitutional standards set forth in *McKaskle*. Under *McKaskle*, the pro se defendant must retain actual control over the defense[249] and standby counsel's actions cannot alter the jury's perception that the defendant is conducting his own defense.[250] If these requirements are met, hybrid counsel would be appropriate under *Faretta*.

Granting Farhad's request for hybrid counsel would not have affected his actual control over the case. Specifically, while Farhad wanted hybrid counsel to represent him throughout the trial, he wanted to make his own opening and closing statements himself.[251] Because the opening statement serves as an overview for the defense by outlining the defense's arguments and detailing what types of evidence will be admitted, Farhad could have "set the course" of his defense with his opening statement. Similarly, Farhad could have used the closing argument as an opportunity to distill the defense's arguments and provide a summary of what the jury had seen.

The jury's perception of whether Farhad had conducted the defense would not have been affected by appointing hybrid standby counsel. Farhad stated he would conduct jury selection and present both opening and closing statements.[252] Allowing Farhad to select the jury would give potential jurors the impression that he had control over his defense. Furthermore, by presenting the opening and closing statements, Farhad would appear to be in control of his own case. He would, in effect, be the first person and last person the jury would en-

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[248] *See Farhad*, 190 F.3d at 1102. Farhad, in response to the court's inquiry why he wanted to proceed pro se, responded that he wanted to present a "more glorious kind of defense." *Id.*

[249] *See McKaskle*, 465 U.S. at 178.

[250] *See id.*

[251] *See Farhad*, 190 F.3d at 1099.

[252] *See id.*

counter from the defendant's table. Thus, if Farhad shared duties with hybrid standby counsel, it appears he would have maintained actual control over the defense and provided the jury with the impression that he had control over his defense.

C. THE 9TH CIRCUIT SHOULD HAVE PROVIDED FARHAD ACCESS TO INVESTIGATIVE AND RESEARCH MATERIALS

Hybrid counsel for a pro se defendant would also alleviate other problems characteristic of a pro se defense, such as the pro se defendant's lack of access to legal materials. For example, in *Farhad*, a defendant who refuses the assistance of appointed counsel also lacks the unlimited access to a law library or other legal materials that counsel would bring to the defense.[253] Standby counsel, however, could serve as a conduit through which the pro se defendant may gain access to otherwise unobtainable materials.[254]

Traditionally, courts have extended judicial assistance only to pro se litigants who are prisoners.[255] Prisoners, these courts claim, have problems that justify the burden placed on the adversary system by treating them in a lenient manner.[256] These problems include limited legal access to legal materials and sources of proof.[257] As prisoners, criminal defendants are limited by physical and monetary restrictions to building their defenses.[258] Farhad is a prime example of these limitations.

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[253] *See id.*

[254] *See* Pearson, *supra* note 218, at 718.

[255] *See* Lewis v. Faulkner, 689 F. 2d 100, 102 (7th Cir. 1982); Moore v. Florida, 703 F. 2d 516, 521 (11th Cir. 1983).

[256] *See id.*

[257] *See id.*

[258] *See id.*

Farhad, as a prisoner, did not have access to witnesses or legal research.[259] He was offered only limited use of library materials.[260] Hybrid counsel would have alleviated this problem because the lawyer does not have these restrictions. Thus, in an effort to alleviate the burdens associated with research and investigation in preparation for his defense, Farhad's rights as a defendant would have been better protected had "hybrid counsel" been assigned to him.

VI. CONCLUSION

The Ninth Circuit's decision in *Farhad* is an unnecessarily narrow reading of a defendant's right to proceed pro se under *Faretta*. Such a strict following of *Faretta* compromises not only the defendant's right to a fair trial, but society's interest in a just criminal trial system. To alleviate this tension, mandatory hybrid counsel offers a means for meeting the interests of all parties to the judicial process.

Courts must provide hybrid counsel in all criminal cases, even over a defendant's objection. If a defendant were given the option of waiving standby counsel, it would circumvent the goal of protecting the unknowing pro se defendant rights. Cost to the system may become an issue, but this concern is mitigated by the efficient administration of justice. Courts dealing with defendants assisted by hybrid counsel would avoid the hassles and delays normally associated with the pro se defense.

All participants in the criminal trial would benefit from a defendant with mandatory hybrid counsel. Defendants, while controlling their cases, would have access to the information and materials necessary for an effective defense.[261] Courts would no longer be compelled to "care for" pro se defendants,

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[259] *Farhad*, 190 F.3d at 1098-1099. Farhad's standby counsel at trial did not access witnesses or conduct legal research for Farhad. It appears his role was limited to solely assisting Farhad at trial. *See id.*

[260] *See id.* at 1100.

[261] *See* Pearson, *supra* note 218, at 719.

and trials would not be hampered by a defendant's lack of technical expertise.[262] Prosecutors could act as fully effective adversaries, confident that the advised defendant is a worthy opponent.[263] Hybrid counsel ensures that the defendant complies with courtroom procedures and that courts follow due process requirements.[264] Additionally, hybrid counsel would assist the court in appropriately and efficiently hearing the case. Finally and most importantly, society would benefit from a criminal justice system that, in accordance with the Fifth Amendment, guarantees a fair trial to every defendant.

Kenneth S. Sogabe[*]

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[262] *Id.*

[263] *See id.*

[264] *See id.*

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